In the Matter of William Stanford
DOP Docket No. 2006-379
(Merit System Board, decided December 7, 2005)

William Stanford, represented by Roosevelt Porter, Esq., appeals the termination of his provisional appointment as a Cost Estimator, Property Improvement with the Township of Irvington.

By way of background, the appellant was appointed provisionally, pending open-competitive examination procedures, to the title of Cost Estimator, Property Improvement, effective May 24, 2004. The open-competitive examination for Cost Estimator, Property Improvement (M0802G), Township of Irvington, was announced with a closing date of February 8, 2005. Department of Personnel (DOP) records reflect that the appellant did not file for the examination. Four candidates were admitted to the unranked, unassembled examination and appeared on the resultant eligible list which promulgated on March 31, 2005 and expires on March 30, 2008. It is noted that the eligible list is ranked according to the residency of the eligibles.[1] Thus, the first ranked eligible is a non-veteran resident of the Township of Irvington, the second ranked eligible is a non-veteran resident of Essex County, and the remaining two non-veteran eligibles, ranked tied for third, were residents of either Bergen, Hudson, Morris, Passaic, or Union Counties. The appellant is a veteran resident of Union County. A certification of that eligible list was issued on April 4, 2005, and the first ranked eligible was appointed, effective July 4, 2005. As a result, the appellant's provisional appointment was terminated, effective July 1, 2005.

In the instant appeal, the appellant contends that the appointing authority negligently failed to notify him of the open-competitive examination, and it unlawfully retained him in his position provisionally for over one year in violation of *N.J.S.A.* 11A:4-13(b). The appellant submits a copy of a January 19, 2005 memorandum from the appointing authority to his supervisor, Hamlet E. Goore, in which Goore is advised that the examination for the appellant's position had been announced with a closing date of February 8, 2005. The appellant asserts that this information was never relayed to him. Thus, the appellant argues that *Kyer v. City of East Orange*, 315 *N.J. Super.* 524 (App. Div. 1998), is analogous to his situation. Specifically, he maintains that, like the appellant in *Kyer*, his failure to achieve permanency in his title was the result of the appointing authority's neglect in not advising him of the provisional nature of his employment or notifying him of the examination. Additionally, the appellant argues that the DOP's practice of

[1] In this regard, residents of the Township of Irvington would appear first on the list, ranked in accordance with their veteran's status. The next sub-list would include residents of Essex County, and the final sub-list would contain residents of Bergen, Hudson, Morris, Passaic, and Union Counties.

publishing examination announcements on the internet is discriminatory because many poor Americans do not have access to the internet. Finally, the appellant emphasizes that, as a veteran, he would have been almost guaranteed a permanent appointment had the appointing authority notified him of the examination.

Despite being provided an opportunity to supplement the record, the appointing authority has presented no further arguments or documentation for the Board's consideration.

CONCLUSION

N.J.A.C. 4A:4-1.5(b) provides, in relevant part, that any employee who is serving on a provisional basis and who fails to file for and take an examination which has been announced for his or her title shall be separated from the provisional title. Because the appellant failed to file for the subject examination, it was appropriate to terminate his provisional appointment. Moreover, in light of the promulgation of a complete list of interested eligibles, the appointing authority was required to utilize this list to make an appointment, thereby displacing the appellant. *See N.J.S.A.* 11A:4-8 and *N.J.A.C.* 4A:4-4.8. Moreover, *N.J.S.A.* 11A:4-13(b) provides that a provisional appointment cannot exceed a period of 12 months. In *Kyer, supra*, the court determined that the City of East Orange's actions in denying Kyer, a seven-year employee, the opportunity to ever achieve permanent status in her competitive career service position, contrary to the Civil Service Act, were so egregious that they warranted a unique remedy.

> It is our view that a delicate balance must be struck between the public and private interests that are subject to prejudice when a governmental entity fails to comply with its statutory obligations. Estoppel is not the answer. First, the Supreme Court has precluded that solution. Second, unqualified persons may thereby be afforded an improper route to permanency. But by the same token, it is no solution to leave remediless the well-qualified, experienced, high-performing, long-term provisional employee *who is unaware that her position is not permanent, who in all likelihood would have easily achieved permanency but for the municipal negligence*, and whose summary discharge from employment is as obviously unfair and arbitrary as this jury found plaintiff's to be. [*Kyer, supra*, 315 *N.J. Super.* at 532-533 (emphasis added)].

Accordingly, the court transferred the case to the DOP to retroactively determine whether Kyer would have qualified for the competitive career service position she provisionally held for seven years and, if so, "to fashion an appropriate remedy." *Id.* at 534. Ultimately, after the remand, the Board determined that, notwithstanding Kyer's years of service or the misdeeds of the appointing authority, she was not

entitled to a permanent appointment since she did not meet the open-competitive requirements for the position at the time the provisional appointment was initially made. *See In the Matter of Ruby Robinson Kyer* (MSB, decided May 4, 1999). *See also Melani v. County of Passaic*, 345 *N.J. Super.* 579 (App. Div. 2001).

However, the instant matter is distinguishable from *Kyer* and does not warrant the granting of the unique remedy set forth above. In the instant matter, the appellant was appointed to the title of Cost Estimator, Property Improvement provisionally, pending open-competitive examination procedures, effective May 24, 2004, and DOP records reflect that his appointment was promptly reported to and recorded by the DOP. There is no dispute that the appellant failed to file for the open-competitive examination that was announced for his position. Contrary to the appellant's assertions, there was no requirement that the appointing authority notify him of the announcement of the open-competitive examination. *See In the Matter of Rene Cora* (MSB, decided April 20, 2005); *In the Matter of Sung Yi* (MSB, decided October 9, 2002); *In the Matter of Donna L. Villecca* (MSB, decided May 8, 2001). In this regard, *N.J.A.C.* 4A:4-2.1(a) provides that open-competitive examinations shall be announced in a monthly job listing or by other appropriate means as approved by the Commissioner to secure sufficient qualified candidates. Currently, it is the DOP's practice to publish all open-competitive examination announcements on its website with instructions on how to file for the examination. The Board finds no merit to the appellant's suggestion that this practice is discriminatory. Although many individuals do not own computers of their own with which they can access the DOP's website, computers are readily available at the DOP for job seekers to peruse job listings, and most public libraries in the State provide similar computer and internet access to the public. The appellant also asserts that the appointing authority was negligent in that it did not advise him of the provisional nature of his employment. However, it is the individual employee's ultimate responsibility to ascertain all relevant information regarding one's employment status, benefits, and requirements. While it may be a better practice to remind a provisional appointee of his status and notify him directly of an examination to attain permanent status, the appointing authority in the instant matter cannot be deemed negligent for its failure to advise the appellant of such items, where it had no obligation under Merit System law and rules to do so.

Finally, the appellant's assertion that his veteran's status would have guaranteed him a permanent appointment had he been notified also warrants comment. In this regard, veteran's preference is applied to non-resident sub-lists *after* the resident list, which may contain non-veteran eligibles, is exhausted. *See In the Matter of Joseph Chapman* (MSB, decided October 7, 1997). Thus, if he had filed for the unranked, unassembled examination, the appellant's name would have appeared third on the resultant eligible list, after all eligibles who were residents of the Township of Irvington and Essex County.

Accordingly, the Board finds no basis to grant the appellant's appeal.

ORDER

Therefore, it is ordered that this appeal be denied.